SRI INAI (PULAU PINANG) SDN BHD

v.

YONG YIT SWEE & ORS

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
[CIVIL APPEAL NO: 12-46-95]
8 DECEMBER 1997

ENGLISH LAW: *Application - Civil Law Act 1956, s. 3 - Application of common law of England - Whether English cases decided after 7 April 1956 can be applied - Tort*

TORT: *Negligence - Landlord's liability - Whether landlord has duty to comply with by-laws - Whether landlord's obligations transferred to tenant - Whether landlord exempted from liability*

TORT: *Occupier's liability - Duty of occupier - Whether premises were safe for contemplated purpose*

TORT: *Negligence - Duty of care - Whether school owes duty to students - Whether negligence established*

The sessions judge had found the first defendant/appellant ('Sri Inai') and the second defendant ('MPPP') liable on an equal basis for a fire which broke out at the premises of Sri Inai, resulting in the death of four students and injury to five others. Both appealed against the decision.

It was the argument of MPPP that the Sessions Court had not dealt with MPPP's liability as landlord *per se* but as landlord-cum-local authority. It was further argued that the case of *Anns & Ors v. London Borough of Merton* decided in 1977 should not have been followed by the Sessions Court judge for s. 3 of the Civil Law Act 1956 ('the Act') only permits the application of the common law of England as administered on 7 April 1956. It was also a complaint against the Sessions Court that the cases of *Cavalier v. Pope* and *Bottomlay & Anor v. Parrister & Anor* were not followed. A further submission was that s. 95(2) of the Street, Drainage and Building Act 1974 ('SDBA') provided complete immunity to MPPP in the circumstances of the case.

Sri Inai contended that the finding of the Sessions Court on the cause of the fire was wrong as MPPP being the landlord had a duty to comply with the requirements of the Uniform Building By-Laws 1986 ('UBBL') and that MPPP should be liable as the local authority for failure to enforce the provisions of UBBL if not solely, at least to a larger extent than Sri Inai. The issues before the court were: (i) whether MPPP was liable as a landlord and/or liable as a local authority; (ii) whether MPPP was negligent for failing to enforce the provisions of the UBBL; and (iii) whether Sri Inai was liable.

Held:

[1] Section 3 of the Act provides that the courts shall apply the common law of England and the rules of equity as administered in England on 7 April 1956. The common law on that day on the liability of a landlord was that held in *Cavaliar v. Pope* and *Bottomlay & Anor v. Parrister & Anor* which stated that, the general rule was that apart from any express or implied contract, a landlord was under no duty to his tenant or any other person who entered the demised premises during the tenancy, to take care that the premises were safe whether at the commencement of the tenancy or during its continuance. The lease transferred all obligations towards third parties from the landlord to the tenant. As a result, the landlord who could no longer be regarded as the occupier of the demised premises was exempted from liability for any dangers existing on them.

[1a] There was no express or implied contract on MPPP as landlord to comply with the requirements of the UBBL. Although MPPP had a discretion to do repairs, on the facts of the case, it only meant restoring to good condition any damage of wear and tear. It could not mean to renovate to comply with the requirements of the UBBL, regarding fire prevention. MPPP was not liable as a landlord.

[2] The common law of England as at 7 April 1956 did not impose a liability for negligence on a local authority for failure to secure compliance with building by-laws. It would be too much a burden to place on the shoulders of a local authority liability for the damage and injury suffered in a building purely on the ground that the local authority had failed to ensure that the house owner or tenant complied with all the by-laws. In the instant case, the MPPP as a local authority was not liable for failing to ensure compliance with the UBBL.

[3] Sri Inai was liable on the principle that a teacher owes a duty of care to his students. It was also liable under occupiers' liability. Although Sri Inai could not be held liable for failure to comply with the by-laws for it was MPPP's view that the by-laws were not applicable to the premises, it could not escape the responsibility imposed by MPPP that the use of premises as a hostel for students was subject to approval. In the circumstances, the question of apportionment between Sri Inai and MPPP would not arise. Sri Inai was solely liable.

[Sri Inai's appeal dismissed; MPPP's appeal allowed.]

Cases referred to:
AC Billings & Sons v. Riden [1958] AC 240 ***(refd)***
Anns & Ors v. London Borough of Meton [1977] 2 All ER 492 ***(not foll)***
Bottomley & Anor v. Parrister & Anor [1931] 1 KB 28 ***(foll)***
Cavalier v. Pope [1906] AC 428 ***(foll)***
Government of Malaysia Ors v. Jumat Mahmud & Anor [1977] 2 MLJ 103 ***(foll)***
Napline Sdn Bhd v. Jones Lang Wooten [1995] 1 CLJ 865 ***(refd)***
Northman Barnet Council [1978] 1 WLR 221 ***(cit)***
Public Prosecutor v. Sykt Perusahaan Makanan Haiwan Bekerjasama [1969] 2 MLJ 250 ***(refd)***
Tok Jwee Kee v. Tay Ah Hock & Sons Ltd & Anor [1969] 1 MLJ 195 FC ***(dist)***
United Hokkien Cemeteries Penang v. Majlis Perbandaran Pulau Pinang [1979] 2 MLJ 12 FC ***(cit)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)
Municipal and Town Boards (Amendment) Act 1975, s. 6(1), (2),
Street, Drainage and Building Act 1974, ss. 52(2), 95(2)

Other sources referred to:
Negligence, Charlesworth, 1962, 4th edn
Negligence, Charlesworth & Percy, 1997, 9th edn, pp 509 - 510

For Sri Inai (Pulau Pinang) Sdn Bhd - M/s Karpal Singh & Co
For Majlis Perbandaran Pulau Pinang - M/s Presgrave & Matthews
For the respondents in both appeals - Mr Thayalan; M/s Meena, Thayalan & Partner

Reported by Michele Saw

JUDGMENT

Abdul Hamid Mohamad J:

There were nine connected civil suits in the Sessions Court ie, Summons No: 53-25-92 to 53-33-92. The plaintiff in each case was different, but the defendants were the same.

All the nine cases were consolidated and tried together. The learned Sessions Court judge gave judgment for each of the plaintiffs against both the defendants, the liability between the two defendants being apportioned equally. Both the defendants appealed separately. The first defendant's (Sri Inai (Pulau Pinang) Sdn. Bhd. which will be referred to as "Sri Inai") appeal was registered as Civil Appeal No: 12-46-95. The second defendant's (Majlis Perbandaran Pulau Pinang which will be referred to as "MPPP") was registered as Civil Appeal No: 12-51-95.

Findings Of Facts Of The Learned Sessions Court Judge

I will now summarise the findings of facts of the learned Sessions Court judge.

(a) MPPP is a local authority under the Local Government Act 1976. It was also the owner of the premises known as No. 1, Jalan Park, Pulau Pinang ("the said premises").

(b) Sri Inai is a company which runs a private school of the same name.

(c) MPPP rented the said premises to Sri Inai to be used and was used as a hostel for students attending the school.

(d) The tenancy was obtained by way of tender. It was for a term of two years and was subsequently further extended for one year on the same terms, until 19 December 1989.

(e) The building had been in existence even before 1922. It was a two-storey building. The ground floor was made of brick with a mortar covering. The first floor was of timber frame and partition walls of brick.

(f) During the material time, the top floor was occupied by 13 students attending Form 3 to Form 5 and the ground floor by two wardens.

(g) There was only one staircase leading from the upstairs hall to the ground floor. The only staircase which gave direct access to a final exit was adjacent to the Forms 3 and 4 rooms, but this had been permanently sealed with floorboards.

(h) All the windows had been fitted with fixed grilles or BRC mesh except for one on the first floor from which PW2 jumped. There were no other secondary exits although there was no shortage of exits on the ground floor.

(i) There were three dry powder fire extinguishers, two on the ground floor and one on the first floor.

(j) There was no fire alarm.

(k) There was no emergency lighting in the entire building.

(1) On 16 February 1989, a fire broke out at the premises, resulting in death of four students and injuring five others. The plaintiffs are either the injured students or the personal representatives of the deceased students.

(m) The fire had originated from the roof void. The learned Sessions Court judge accepted two possible causes of the fire ie, electrical fault due to dirty or loose connection in an electrical circuit particularly that of the water heaters and, secondly, stray fireworks (spent fireworks were found on the ground and the fire occurred during the Chinese New Year period).

(n) She accepted the evidence of PW3 (a fire expert) that if the staircase adjacent to Forms 3 and 4 had not been sealed off, there might have been no loss of life.

(o) She also accepted the opinion of PW3 that except for the one in the kitchen, the fire extinguishers were not placed on exit routes. Further, if there was a fire survey, he (PW3) would have recommended a total of nine fire extinguishers per floor, including water fire extinguishers.

(p) She also accepted the evidence of PW3 that there should have been at least two protected staircases from the first floor; there should have been a hose reel with a reliable supply of water and smoke detectors at ceiling level on both floors and in the roof void. Fire drills should have been conducted and the students taught to use fire fighting equipments and be acquainted with escape routes, which was never done.

Decision Of The Sessions Court Judge

As stated earlier she found both defendants liable on equal basis. As regards Sri Inai her gounds were:

First, the learned Sessions Court judge held that fire was a forseeable risk. In the approval letter of the MPPP, condition (e) was that the premises was to be used as a hostel and "subject to approvals from the relevant authorities regarding the change of usage and the requirements regarding prevention of

fire, if necessary" (my translation). Sri Inai did nothing to ensure compliance of these conditions. It did not consult the fire department regarding fire prevention measures although it complied with condition (f) by taking out the fire insurance. The wardens were not given any instructions regarding fire safety.

She relied on the principle enunciated by the Federal Court in *Government of Malaysia Ors v. Jumat bin Mahmud & Anor* [1977] 2 MLJ 103. That case says that by reason of the special relationship between teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care for the safety of the pupil. The duty of care on the part of of the teacher must commensurate with his/her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take care of own children. Applying that principle to the facts of the case she found that Sri Inai, having undertaken to accomodate the students in the premises was under a duty to protect them from known dangers that should be apprehended, eg, fire. On the facts she found Sri Inai negligent and liable to the plaintiffs.

Secondly, the learned Sessions Court judge also found that Sri Inai was also liable under the head of "occupiers liability". This is what she said at p. 274:

> I also accepted the submissions of learned counsel for the plaintiffs that the 1st defendant was liable under the head of occupier's liability. The case of *Maclenan v. Segar* [1917] 2 KB 325 was relied on. There it was held that 'Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction alteration, repair or maintenance of the premises'. Applying this principle to the facts, the 1st defendant was also liable for breach of the warranty that the premises were as safe for the purpose of a hostel as reasonable care and skill on the part of anyone could make them.

Thirdly, the learned Session's Court judge also found that Sri Inai had contravened the provisions of the Uniform Building By-Laws 1986 (UBBL).

As regards MPPP she found that MPPP had a dual capacity, first as a local authority and, secondly, as a landlord. The learned Sessions Court judge found that MPPP was liable for failure to enforce the provisions of UBBL in its capacity as a local authority entrusted with the responsibility to enforce it. She also found MPPP liable in its capacity as landlord. She relied on *Tok Jwee*

Kee v. Tay Ah Hock & Sons Ltd. & Town Council Johore Baru [1969] 1 MLJ 195 FC and *Anns & Ors v. London Borough of Meton* [1977] 2 All ER 492. She also disagreed with the submissions of the learned counsel for MPPP that s. 95(2) of the Street, Drainage and Building Act 1974 (SDBA) offered a complete immunity to MPPP.

My Judgment

General

First, let me say that I accept the findings of facts of the learned Sessions Court judge. Besides her finding about the possible causes of the fire which I will discuss in greater detail, I accept her reasons why she found those facts as she did. She had discussed the evidence in great detail, gave her reasons why she accepted the evidence of PW3 over other witnesses and why she accepted the evidence which she did. I find no reason why this court, as an appellate court, should differ from her findings.

Secondly, I must also point out that I agree with her observation that the defence of Sri Inai was to try to shift the blame to MPPP.

Cause Of Fire

It was argued that the learned Sessions Court judge was wrong in her finding as to what had caused the fire and, consequently, was wrong in her finding as to the apportionment of liability as between the Sri Inai and MPPP.

Learned counsel for Sri Inai submitted that the more probable cause of the fire was a short circuit due to old and faulty state of wiring and resistive system.

I think I have to reproduce that part of the judgment of the learned Sessions Court judge. She said at p. 388 of the Appeal Record:

> According to PW3, since the fire originated from the roof void, there were only two plausible causes. ie, electrical fault or ignition of part of the roof structure by a stray firework. Two possible causes were resistive heating or short circuit. He ruled out a short circuit as there was no evidence of a blown fuse. Resistive heating results from a dirty or loose connection in an electrical circuit, and the amount of heat generated would depend on the electrical rating of the appliance connected to the circuit. In the instant case, the only appliances capable of generating this sort of fault were the water heaters, of which only the one in the Form 5 room was working.
>
> There is no dispute that spent fireworks were found in the grounds and that the fire occurred in the Chinese New Year period. Based on the evidence, PW3's opinion as to the two plausible causes of the fire was reasonable and unchallenged, and I accept it.

What I understand from this passage is that, first, according to the evidence of PW3 there are two possible causes of the fire: (i) electrical fault and (ii) stray fireworks. As regards electrical fault there are two possible causes: (i) resistive heating and (ii) short circuit. She accepted the evidence of PW3 who ruled out short circuit as the cause of "electrical fault". That left her with only one possible cause of "electrical fault" which was "resistive heating". Then she went on to explain that resistive heating "results from a dirty or loose connection n an electrical circuit, and the amount of heat generated would depend on the electrical rating of the appliance connected to the circuit. In the instant case, the only appliances capable of generating this sort of fault were the water heaters, of which only the one in Form 5 room was working".

The only difference I can see between the finding of the learned Sessions Court judge as to the cause of the fire (other then stray fireworks) and that submitted by learned counsel for Sri Inai is that, the learned Sessions Court judge ruled out short circuit but found that it was due to "resistive heating" resulting from "dirty or loose connection in an electrical circuit". Learned counsel for Sri Inai submitted that it was due to "a short circuit due to old and faulty state of wiring and resistance system".

I find the ground as submitted by the leaned counsel for Sri Inai rather confusing. PW3, whose expert evidence was accepted by the learned Sessions Court judge, with whom, on this point I have no reason to disagree, explained very clearly about "short circuit" and "resistive heating".

He said at p. 321 of Part A of the Appeal Record (12-51-95).

> There are 2 basic types of electrical faults which can give rise to fire. The first involves damage to cable insulations resulting in he conductors coming into contact with each other and causing arcing which will eventually lead to a short circuit which blows the fuse.
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> The 2nd type is known as resistive heating. When we use electrical appliances, the electricity is used by the elements in the appliance to generate heat. In a working electrical appliance that heat is generated by using a property of electricity which is to do with the fact that if one applies resistance to the circuit ie, make it more difficult for the electricity to flow, that resistance causes that part of the circuit to become hot.
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> Normally, all parts of the electricity leading up to the working applianced are provided with usually copper conductors with have little or no resistance to the passage of electrical current. It is very rare for an electrical installation for the appliance to be connected directly to the supply. There are usually many connections eg, at the distribution board, at the outlet socket in the plug itself and at the appliance. In addition, it is normal to find in electrical installations that the distribution wiring is made up of a number of different lengths of cable

joined together at junction boxes. All of those connection points are potential weak each points in an electrical circuit. If the conductors are in good condition and if the connecting terminals are tight, there is very little resistance to the flow of electricity an those parts will act almost in the same way as a continuous length of cable. In practice, those joints can sometimes become loose and with atmospheric oxidation can also become dirty. Either of these conditions imposes a resistance to the flow of electricity and in a way analogous to the workings of the element in a working appliance, heating will occur at these weak points. It is called resistive heating.

The amount of heat generated at such a fault is related to the amount of current trying to pass through the fault. It is related to the electrical rating of the appliance connected to the circuit because the amount of heat generated is proportional to the square of the size of current. It means heavily rated appliances have a much more severe effect at these faults then an appliance which draws little current such as a lighting circuit or a fan.

In this building the only potential appliances I found capable of generating this sort of fault were the water heaters in the 2 bathrooms, although I understand 1 of them was inoperable.

In short, "short circuit" and "resistive heating" are two different things. They are two different types of "electrical fault". "Resistive heating" does not cause a "short circuit", as submitted by learned counsel for Sri Inai.

The learned Sessions Court judge had given her reasons why she preferred the evidence of PW3 and why she accepted his evidence which I do not wish to repeat. I have no reason to disagree either with her reasons or her finding.

In any event, whether the fire was caused by resistive heating or short circuit or stray fireworks makes no difference to the plaintiff's case. This is because the plaintiffs are not alleging negligence against the defendants for causing the fire, but for failure to provide reasonable fire safety measures and safeguards.

Negligence Of MPPP

The main thrust of the argument of learned counsel for Sri Inai was that MPPP was negligent. Therefore, Sri Inai was not or even if negligent, it was only to a lesser extent.

That being the case I have to discuss and decide on the negligence of MPPP first.

The Approach

The learned Session's Court judge found MPPP negligent as a local authority and also as a landlord. This is what she said at p. 282 of the Record of Appeal, Part A:

> I accept the submission for the plaintiffs that the 2nd defendant (MPPP - added) was liable for injury and damage by their failure to enforce the provisions of UBBL in their capacity as local authority entrusted with that responsibility **and also in their capacity as landlord.**

Then she went on to discuss and rely on *Tok Jwee Kee v. Tay Ah Hock & Sons Ltd. & Town Council Johore Baru* [1969] 1 MLJ 195 FC and *Anns & Ors v. London Borough of Meton* [1977] 2 All ER 492. In both those cases the local authorities were not landlords. They were held liable as local authorities.

I agree with the submission of learned counsel for MPPP that the learned Sessions Court judge did not really cover the issue of MPPP's liability as landlord, *per se,* but as landlord-cum-local authority.

I gave serious thoughts as to whether, faced with this kind of situation, a court should consider MPPP's liability for negligence in its dual capacities separately or together. I am of the view that it should be considered separately. I will give my reason by way of an illustration: A is a traffic police man. It is part of his duty to enforce traffic laws. But he also drives, either in the course of duty or otherwise. If he is involved in an accident and the issue is whether he is negligent or not, he is and should be treated like any other driver, not as a driver-cum-traffic policeman. The question will then be whether as a driver he owes a duty of care to other road-users and whether as a reasonable driver he had done everything he could possibly do to avoid the accident. The law does not say, as I understand it, that as a traffic policemen he owes a higher duty of care to other road users or that he should do more than other drivers to avoid the accident just because he is the enforcement authority. To say otherwise would be most unfair and unreasonable. It is not who the driver is but how a vehicle is driven which causes an accident. It is also not who the driver is which determines the seriousness of the injury.

For that reason, it is my view that, in this case, MPPP's negligence should be separately considered under its two capacities.

Section 3 Civil Law Act 1956

Before going any further I will have to deal with this thorny problem first. This arises from the provision of s. 3 of the Civil Law Act 1956 which provides:

3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall -

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956,

(b) ...

(c) ...

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

Learned counsel for MPPP raised this issue when he argued that the learned Sessions Court judge should not have followed the case of *Anns & Others v. London Borough of Merton* [1977] 2 All ER 492 on the ground that that case was decided after 7 April 1956. That case concerned a local authority, not a landlord, but the argument applies now when I am considering the negligence of MPPP as a landlord as it does as a local authority. Because in both situations we are applying the Common Law of England. Therefore I might as well deal with this issue now.

This provision always gives me problems. On the one hand it is the law of this country. It has to be complied. On the other hand, courts in this country, except on very rare occasions, do not seem to pay any attention to this provision. Instead the courts appear to apply the Common Law of England, irrespective of the date of the decision as if that provision does not exist at all.

I had occasion to consider this problem once. This was in the case of *Napline Sdn Bhd v. Jones Lang Wooton* [1995] 1 CLJ 865. That case went on appeal to the Court of Appeal and was dismissed on 6 January 1997. I was told that no written judgment had been given so far. So I do not really know what the Court of Appeal thought about what I said there. And this is what I said:

My humble view is that the provision of s. 3 of the Civil Law Act 1956 as it stands today, is the law of Malaysia. Courts in Malaysia have no choice but to apply it.

So, I will have to consider the provision of s. 3 of the Civil Act 1956. That section says clearly that save so far as other provision has been made prior to or may be made after 7 April 1956 by any written law in force in Malaysia, the court shall, in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956.

However, the said common law and the rules of equity shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

In my view the approach that the court should take is first to determine whether there is any written law in force in Malaysia. If there is, the the court need not look anywhere else. If there is none, then the court should determine what is the common law of, and the rules of equity as administered in England on 7 April 1956. Having done that the court should consider whether "local circumstances" and "local inhabitants" permit its application, as such. If it is "permissible" the court should apply it. If not, I am of the view that, the court is free to reject it totally or adopt any part which is "permissible", the court should by it. If not, I am of the view that, the court is free to reject it totally or adopt any part which is "persible", with or without qualification. Where the court rejects it totally or in part, then there being no written law in force in Malaysia, the court is free to formulate Malaysia's own common law. In so doing, the court is at liberty to look at any source of law, local or otherwise, be it common law of, or the rules of equity as administered in England after 7 April 1956, principles of common law in other countries, Islamic law of common application or common customs of the people of Malaysia. Under the provision of s. 3 of the Civil Law Act 1956, I think, that it is the way the Malaysian common law should develop.

In taking this approach I find that the most difficult thing to do is to determine what is the common law of England on 7 April 1956 on negligent misstatement or omission.

I am still of the same view.

Law As On 7 April 1956: Re Landlord

The problem as in *Napline* is to determine the Common Law of England on the subject as on 7 April 1956.

First I will reproduce a passage from Charlesworth on *Negligence* 4th Edn (1962):

> **Liability of vendor or lessor.** Neither a vendor nor a lessor of property is under any liability for its dangerous condition after he has parted with possession to the purchaser of lessee. 'The authorities show that if a landlord, or if a vendor of property, sells or lets a house which is defective to such an extent to be a danger to the tenant and his family, or the purchaser, and of course to other persons entering the house he is absolved from liability; he is is not under any duty in law resulting from the defective condition of the premises which he sells or lets. That position is so even if he is himself the person who has put the house into that condition and, of course, has knowledge of the dangerous condition in which it is. It follows that, if he is not under

any such obligation to the lessee or purchaser, equally he is not under any obligation to a stranger who happens to be visiting the premises.'

The 9th Edn (1997) of the same book explains the development of the law in England very clearly, at p. 505 to 507:

> Traditionally, apart from contract or implied warranty, neither a vendor or a lessor of property was under any tortious liability for its dangerous condition once he had parted with its possession to the purchaser or lessee. In the case of a vendor who is not the builder of the property this traditional rule remains; some development of the law has however taken place in relation to lessors and in relation to vendors who build and sell.
>
> The lessor. The general rule was that, apart from any express or implied contract, the landlord was under no duty to his tenant or any other persons who entered the demised premises during the tenancy, to take care that the premises were safe, whether at the commencement of the tenancy or during its continuance. "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenants' remedy is upon his contract, if any."
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> Accordingly, unless the tenant had an express contract that the landlord would keep the demised premises in repair, he had no remedy against the landlord if he were injured by reason of their lack of repair. This was because it was well settled, in the case of the letting of unfurnished houses or flats, that there was no implied term of the contract on the part of the landlord that either the premises were fit for habitation at the commencement of the letting, or would be maintained in repair during the tenancy.
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> The letting of a furnished house or rooms was an exception to the general rule, such an agreement containing an implied condition that the premises and furniture within them were fit for immediate occupation or use at the beginning of the tenancy. Should they not be so fit, the tenant could terminate the tenancy or sue for damages in respect of any injuries sustained or loss and damage suffered.
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> At common law, the lease transferred all obligations towards third parties from the landlord to the tenant. As a result, the landlord, who could no longer be regarded as the occupier of the demised premises, was exempted from liability for any dangers existing on them. This remained the situation even where the landlord had taken upon himself contractually the obligation of keeping the premises in repair *Cavalier v. Pope* [1906] AC 428 established that such a contract being *res inter alios acta*, did not confer upon strangers to it any rights against the

> landlord which they would not have had in any event. Thus the landlord's immunity was at one time complete and covered not only nonfeasance such as his omission negligently to carry out repair but also malfeasance, such as his negligence in installing an unventilated gas geyser in a bathroom, putting the user at great risk of carbon monoxide poisoning. His immunity even extended to give protection in respect of negligent acts or omissions which had taken place before or after the demise.

One of the first steps in the erosion of this immunity of the lessor from actions in negligence was taken in *A.C. Billings & Sons v. Riden,* where the House of Lords overruled those decisions which had held the landlord immune from liability in respect of dangers he had positively created after the demise. Today the immunity has largely disappeared, principally in consequence of the legislation discussed below, but it should be noted that while the decision in *Cavalier v. Pope* has been reversed as regards situations falling within the Acts of 1957 and 1972, it is still the law where the facts fall outside their scope. As was pointed out in *Rimmer v. Liverpool City Council*,

> ... section 4(1) of the Occupiers Liability Act 1957, and section 4(1) of the Defective Premises Act 1972, which replaced and extended it, imposed a liability only on landlords who are under an obligation to repair and maintain the tenant's premises and only for defects in maintenance and repair. Section 4(1) of the Act of 1957 limited a landlord's liability to default in carrying out his obligations for maintenance and repair, section 4(1) of the Act of 1972, while it extends the ambit of the duty to all persons who might reasonably be expected to be affected by defects in the premises, retains the limitation by defining defects in section 4(3) as those arising from an act or omission which constitutes a failure by the landlord to carry out his obligations for maintenance or repair. Neither of these sections imposed on a landlord any duty in respect of the state of a tenant's premises at the date of the letting.

The liability of the lessor where the plaintiff has suffered damage on premises retained by the former in his own occupation has already been considered above. He will be liable in tort under the Occupiers' Liability Act 1957. The case of a plaintiff who suffers damage while on adjoining premises, as a result of the defective condition of premises retained by the lessor in his occupation is considered at the end of the chapter.

Cavalier v. Pope [1906] AC 428 and *Bottomley & Another v. Parrister and Another* [1931] 1 KB 28 were also cited by learned counsel for MPPP. Indeed, one of his complaints against the judgment of the learned Sessions Court judge was that she did not follow these authorities.

As can be seen from these authorities, the general rule is that (it appears that in England "was"), apart from any express or implied contract, the landlord is under no duty to his tenant or any other person who enters the demised premises during the tenancy, to take care that the premises is safe, whether at the commencement of the tenancy or during its continuance. The lease transfers all obligations towards third parties from the landlord to the tenant. As a result, the landlord, who can no longer be regarded as the occupier of the demised premises is exempted from liability for any dangers existing on them. In England one of the first steps in the erosion of this immunity of the lessor came from the decision of the House of Lords in *A.C. Billings & Sons v. Riden* [1958] AC 240. (Note the date). In England today, the immunity has largely disappeared, **principally in consequence of legislation,** namely the Occupiers Liability Act 1957 and Defective Premises Act 1972 (both English Statutes). However the decision in *Cavalier v. Pope* [1906] AC 428 is still the law, in England, where the facts fall outside the scope of the said legislation.

This reminds us of the danger of following post 1956 English cases which were in fact decided based on new legislations there.

In my view the common law as on 7 April 1956 is as stated by the learned authors referred to above and as stated in *Cavalier v. Pope* [1906] AC 428 and *Bottomley & Another v. Barrister and Another* [1931] 1 KB 28. I do not see any reason why I should invoke the proviso to s. 3(1) of the Civil Law Act 1956 "to make such qualifications as local circumstances render necessary."

So, the question is whether there is any express or implied contract for MPPP to provide the additional staircase etc to comply with the requirements of UBBL.

It is clear to me that there is none. Indeed, MPPP'S letter of 19 December 1986 very clearly states "kegunaan yang dibenarkan – Hendaklah diguna sebagai asrama untuk para penuntut-penuntut dan kegunaannya adalah tertakluk kepada kelulusan daripada Jabatan-Jabatan yang berkenaan termasuk penukaran kegunaan **serta keperluan dari segi perlindungan kebakaran jika perlu**".

It is true that under para. (g) of the Agreement Sri Inai covenanted to permit MPPP and its agents to enter and view the state and condition of the said premises and to execute and do any repairs alterations or painting to the said premises. This is further followed by para. (b) of cl. 4 which gives MPPP a discretion to execute and do any repair to the said premises.

So, first, MPPP has a discretion whether to do any repair or not. Secondly, on the facts of this case, in my view "repairs" can only mean restoring to good condition of any damage or wear and tear. It cannot mean to renovate to comply with the requirements of UBBL regarding fire prevention. That is the responsibility of Sri Inai, as clearly stated in the letter of 19 December 1986, of course with the written permission of MPPP (para. (h) of the said letter).

In conclusion, it is my view that on the facts of this case, there is no express or implied contract for the MPPP to do any renovation to comply with the requirements of fire prevention. As such, I am of the view that MPPP is not liable as a landlord.

MPPP As A Local Authority

Now we come to the issue whether MPPP as a local authority, is negligent for failure to apply UBBL to the premises and to see to it that Sri Inai complies with it.

(a) Whether UBBL applies to the said premises

UBBL came into force on 1 January 1986. Parts VII, VIII and IX and the Schedules deal, basically, with fire requirements, fire alarm etc.

The first question is whether UBBL applies to the said premises.

Though rather lengthy, for purpose of clarity, it is necessary to reproduce some of the provisions.

It is not disputed that the By-Laws came into force on 1 January 1986.

By-Law 134 provides:

> 134. For the purpose of this Part every building or compartment shall be regarded according to its use or intended use as falling within one of the purpose groups set out in the Fifth Schedule to these By-laws and, where a building is divided into compartments, used or intended to be used for different purposes, the purpose group of each compatment shall be determined separately:

By-Law 254 provides:

> 254. Buildings which on the date of commencement of these By-laws have been erected, or in the course of being erected or have not been erected but plans have been submitted and approved, and which according to by-law 134 fall within, the classification of Place of assembly, Shop, Office, Other

Residential and buildings exceeding 18.5 meters and buildings which are classified as hazardous or special risks shall be modified or altered to comply with Parts VII and VIII of these By-laws within -

(a) one year from the date of commencement of these By-laws in the case of buildings up to three storeys; and

(b) three years from the date of commencement of these By-laws in the case of buildings exceeding three storeys.

The Fifth Schedule provides for "designation of purpose groups". Group I, II and III as described as follows:

FIFTH SCHEDULE

DESIGNATION OF PURPOSE GROUPS

(By-law 134, 138)

Number of purpose group	Descriptive Title	Purposes for which building compartment is intended to be used.
I	Small residential	Private dwelling house detached or semidetached (not including a flat or terrace house) not comprising more than (1) a ground storey; (2) one upper storey; and (3) a basement storey or basement storeys
II	Institutional	Hospital, school or other similar establishment used as living accommodation for, or for treatment, care or maintenance of, persons suffering from disabilities due to illness or old age or other physical or mental disability or under the age of 5 years, where such persons sleep in the premises
III	Other residential	Accommodation for residential purpose other than any premises comprised in groups I and II.

In the Seventh Schedule, the following are listed under "Other Residential": Hotels, Flats, Dormitories.

In the Tenth Schedule the following are listed under "Small Residential": private dwelling house, Terrace Type and Semi Detached, Hotels, Hostels and Dormitories are under "Other Residential".

It is not disputed that that UBBL is in force in Penang and that MPPP is the authority which enforces it.

The first dispute is over classification of the said premiss, whether it comes under "small residential" or "other residential". This is because MPPP took the view that the requirements for "other residential" were not applicable because MPPP classified the premises under "small residential".

On this point, the dispute is whether By-law 254 is to be interpreted conjunctively or disjunctively. If it is interpreted conjunctively as submitted by the learned counsel for MPPP it means that before Parts VII and VIII of the By-laws can apply to a particular building, the building must:

(1) be used or intended to be used for one of the purpose groups set out in Fifth Schedule, **AND**

(2) it must exceed 18.5 m. in height; **AND**

(3) it must be classified as harzadous or special risks.

On the other hand if the provision is interpreted disjunctively, so long as the building falls under one of the three categories, then Parts VII and VIII apply. The problem arises because of the use of the "and" in by-law 254.

I agree with the learned Sessions Court judge who agreed with the submission of the learned counsel for the plaintiffs that by-law 254 should be read disjunctively. My reasons are as follows: First, to interpret that by-law conjunctively will lead to an unreasonable, indeed a ridiculous result. It means that even a factory ("a place of assembly") need not fulfill fire requirements unless:

(a) it exceeds 18.5 meters, **and**

(b) it is classified as harzadous or special risk.

Secondly, if every building has to be classified as harzadous or of special risk before the provision applies there would be no need to provide the other two conditions (classification under by-law 134 and exceeding 18.5 meters).

Thirdly, the word "building is repeated after the word "and" twice making it clear that that clause refers to different categories of "building".

Fourthly, only a disjunctive interpretation will promote the general legislative purpose ie, public safety. I think this is a case which justifies the court to adopt the purposive approach of interpretation – see passage from judgment Lord Denning M.R. In *Northman Barnet Council* [1978] 1 WLR 221 quoted in *United Hokkien Cemeteries, Penang v. Majlis Perbandaran, Pulau Pinang* [1979] 2 MLJ 12 FC.

Fifthly, Sharma J in *Public Prosecutor v. Syarikat Perusahaan Makanan Haiwan Bekerjasama* [1969] 2 MLJ 250 said: "It is occasionally necessary to read the conjunction "and" as if it were "or" so that the meaning and the intent of the legislature can be carried out". I think this Is such a case.

Sixthly, by-law 134 provides:

> For the purpose of this Part every building ... shall be regarded according to its use or intended use as falling within one of the purpose groups set out in the Fifth Schedule ...

There is no dispute that the said premises was used as a hostel since December 1986 until the date of the incident. MPPP rented it to be used as a hostel. So, it is clear that it can only fall under purpose group "other residential" in the Fifth Schedule.

Seventhly, in the Seventh Schedule "Other residential" includes "dormitories". In the Eight Schedule "Other residential" includes "dormitories" and "boarding houses."

MPPP took the position that the by-law was not applicable because MPPP classified the premises as "small residential". With respect this classification by MPPP is wrong in law, defeats the purpose of the by-law, promotes hazards rather than safety.

It was also not disputed that the provisions of UBBL were not complied with eg, by-laws 166, 167, 168, 172, 174, 225, 237 and 10th Schedule, all concerning security measures in case of fire.

Now we come back to the question whether MPPP, as local authority which was empowered to enforce the UBBL but did not enforce it (indeed by a wrong classification took the view that it was not applicable to the premises) and did not see to it that Sri Inai complied with it, was negligent for the failure to do so.

Here again we are faced with the problem arising from the provision of s. 3 of the Civil Law Act 1956.

First I will refer to Charlesworth & Percy on *Negligence* 9th Edn (1997) under the heading "liability of Vendors, lessors, Builders and Local Authorities" at p. 509 - 510. There is a sub-heading intituled "local authorities". The learned authors said at p. 509:

> It was at one time thought that a duty of care was owed by the authority supervising work for purposes of the building regulations to avoid putting any future inhabitant of a building under threat of avoidable injury to person or health by reason of any defect. This duty was elaborated in the well-known case of *Anns v. Merton London Borough* [1978] AC 728 and a number of subsequent decisions. It was then rejected by the House of Lords in *Murphy v. Brentwood District Council* [1991] 1 AC 398 some thirteen years after it had received their approval. The extensive discussion of *Anns* in previous editions of this book is therefore superseded.

As pointed out by the learned authors, in *Murphy* the local authority was only concerned with the scope of its duty of care; it did not seek to argue that in fact it owed no duty at all. Lord Keith in *Murphy* said and was quoted by the learned authors:

> Not having heard argument upon the matter, I prefer to reserve my opinion on the question whether any duty at all exists. So far as I am aware, there has not yet been any case of claims against a local authority based on injury to the person or health through a failure to secure compliance with building byelaws. If and when such a case arises, that question may require further consideration.

It is interesting to note that in the 1962 edition of the same book the same part is entitled "Liability of Vendor or Lessor". Missing are the words "Builders and Local Authorities" and not a word was written on the liability of local authorities. This can only mean that until 1962 (six years after the 1956 cut-off date) the Common Law of England still did not impose a liability for negligence on a local authority for failure to secure compliance with building by-laws.

Having also read some other reference books, I am of the view that the common law of England as on 7 April 1956 [Indeed even after *Murphy* [1991] did not impose a liability for negligence on a local authority for failure to secure compliance with building by-laws.

As a matter of policy, I also think that it would be too much a burden to place on the shoulders of a local authority which is financed by the public at large to be liable for damage and injury suffered in a building (especially if not owned by the local authority.) **purely** on the ground that the local authority, **as a local authority,** has failed to ensure that the house owner or tenant complies with all by-laws.

We see too often house buyers start knocking down the walls etc of their newly purchased and newly completed houses and do all kinds of renovations and extensions within weeks from the delivery of possession by the developers. Obviously, it is done without approval as approval cannot come that fast. Of course they breach the by-laws. Of course the local authority is empowered to and is under a duty to enforce the by-laws. Of course there is a failure on the part of the local authority to enforce compliance with the by-laws. But I do not think the law should go so far as to hold that the local authority is liable for negligence for not ensuring that the by-laws are complied with in all such cases.

Take another example. The police has power to summon any motorist for exceeding speed limits. Assuming that an accident occurs and someone is injured and one of the causes is that the vehicle was travelling at an excessive speed, exceeding the speed limit at the place. Can it be argued that the police (ie, the Government of Malaysia) should also be held liable for negligence for not ensuring that that vehicle did not exceed the speed limit? I do not think so. Indeed it should not be so.

On these grounds I am of the view that MPPP, **as a local authority,** is not liable for failure to ensure compliance with UBBL.

However, this should not be taken as an excuse for authorities not to enforce laws they are under a duty to enforce. Laws are made to be enforced. Laws are only effective if they are strictly, consistently and continuously enforced.

Section 95(2) SDBA

Section 95(2) of the Street, Drainage and Building Act 1974 (SDBA) provides:

> (2) The State Authority, local authority and any public officer or officer or employee of the local authority shall not be subject to any action, claim, liabilities or demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act or any by-laws made thereunder or by reason of the fact that such building works or the plans thereof are subject to inspection and approval by the State Authority, local authority, or such public officer or officer or employee of the State Authority or the local authority and nothing in this Act or any by-laws made thereunder shall make

a it obligatory for building, building works or materials or the site of any proposed building to ascertain that the provisions of this Act or any by-laws made thereunder are complied with or that plans, certificates and notices submitted to him are accurate.

Learned counsel for MPPP submitted that this section provided a complete b immunity to MPPP in the circumstances of this case.

The learned Sessions Court judge disagreed with his submissions. It is again a question of interpretation.

The first question is whether the section is to be read disjunctively or c conjunctively ie, the first part of the subsection ending with the words "... of the local authority" and the part beginning with the words "... **and** nothing in this Act ...".

I am of the view that the subsectiqn should be read disjunctively. But, the d question is, even if so read, what does it mean?

To my mind it means this, in so far as it is pertinent to this case:

(a) The first part exempts the local authority from liabilities arising out of any building or other **works carried out.**

e (b) The second part exempts the local authority from the obligation **to inspect** any building ... to ascertain that the provisions of this Act any by-laws made thereunder are complied with.

It is clear to me that this provision contains two distinct parts, but neither f applies to the facts of this case. This is because the negligence alleged here is for failure to enforce the by-laws, not negligence arising out of works carried out or failure to inspect.

In my judgment, s. 52(2) of SDBA does not exempt MPPP from liability in this case, if it is liable under the Common Law.

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However, this finding is academic in view of my earlier finding that MPPP, as a local authority, is not liable for negligence for failure to ensure compliance with UBBL. I nevertheless express my opinion on s. 52(2) of SDBA as it was argued extensively for consideration of the higher courts.

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Tok Jwee Kee

I think I have to say a few words about the case of *Tok Jwee Kee v. Tay Ah Hock & Sons Ltd* Town Council, Johore Baru [1969] 1 MLJ 195 FC.

To try to keep this judgment as short as possible, I will only reproduce one portion of the judgment which is relevant to the present case, at p. 201:

> Therefore, if any breach by the council of its duty under section 145 (either through oversight, ineptitude, indifference to the low or worse) results in damage to the owner of any adjoining land in a residential zone such as the plaintiff, he has, in my judgment, a civil remedy for damages against the council.

For easy reference s. 145 of the Johore Town Boards Enactment (Johore No. 118) provides:

> 145(i) The board shall refuse to approve the plan of any new building ... unless such plan is in conformity with the approved plan.

On this point, I agree with the submission of the learned counsel for MPPP that the effect of this judgment has been legislatively reversed by the Municipal and Town Boards (Amendment) Act 1975 which, by virtue of s. 6(1) and (2) introduced a new s. 92B into the Johore Town Boards Enactment (Johore Enactment No 118). The relevant portion of the new s. 92B would then read:

> The Town Board and President shall not be subject to any action, claim, liabilities or demand whatsoever ... by reason of the fact that such building, works or the plans thereof are subject to inspection and approval by the Town Board and President.

This section is in *pari materia* with s. 95(2) of SDBA. On similar facts MPPP would also be saved by s. 95(2).

In any event, I think that that case is distinguishable from the present case. In that case the court was concerned with a fact situation where the Council approved a building plan not in conformity with the approved plan. In this case, it is for **failure** to ensure that the by-laws are complied with.

Liability Of Sri Inai

The argument of the learned Council for Sri Inai was, first, to shift the blame to MPPP. Secondly, he argued that there was contributory negligence on the parts of the students.

On the first ground, learned counsel argued that the finding of learned Sessions Court judge on the cause of fire was wrong. I have dealt extensively with this point and will not repeat.

I have also discussed the issue of liability of MPPP as a landlord and as a local authority I shall not repeat either.

I agree with the decision and reasoning of the learned Sessions Court judge that Sri Inai is liable, first, on the principle that a teacher owes a duty of care to his students. For easy reference I reproduce that part of the judgment of the learned Sessions Court judge, with which I agree:

> In the case of *Government of Malaysia & Ors. v. Jumat bin Mahmud & Anor* [1977] 2 MLJ 103, the Federal Court held that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care for the safety of the pupil. The duty of care on the part of teacher to the plaintiff must commensurate with his/her opportunity had ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take care of his own children. Applying this principle to the facts, I found that the 1st defendant having undertaken to accommodate the students in the premises was under a duty to protect them from known dangers or those that should be apprehended. For the reasons set out the danger from fire was definitely one which was foreseeable, and had the 1st defendant taken the steps or perhaps even some of the measures on fire prevention and fire safety recommended by PW3, damage could have been minimised, if not averted. It was obvious from the evidence of the students that they only became aware of the fire after it had been burning for some time. Had an alarm been installed, they may have been aware of it earlier and gained valuable time in ensuring a safe exit. Doubtless, PW3's recommendations may have been given with the benefit of hindsight but in my view, some of the measures should have been taken had the persons in charge applied their minds to the risk of fire or obtained the advice of the Fire Department. On the facts and the law, I found the 1st Defendant negligent and liable to the plaintiffs.

I also agree with her decision and reasoning that Sri Inai is also liable under the head of "occupiers" liability. Again I will just reproduce that part of the judgment.

> I also accepted the submissions of learned counsel for the plaintiffs that the 1st defendant was liable under the head of occupier's liability. The case of *Maclenan v. Segar* [1917] 2 KB 325 was relied on. There it was held that 'Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable

> care and skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises'. Applying this principle to the facts, the 1st defendant was also liable for breach of the warranty that the premises were as safe for the purpose of a hostel as reasonable care and skill on the part of anyone could make them.

I must admit however that I have some difficulty deciding whether Sri Inai is liable for failure to comply with the by-laws. This is because MPPP, the local authority empowered to enforce the law, itself took the view that the by-laws were not applicable to the premises. In fairness to Sri Inai, I think I should not hold Sri Inai liable on this ground.

However, I do not think that Sri Inai can escape the responsibility imposed by MPP in the letter dated 19 December 1986 to Mr. E.M. Augustine, on behalf of Sri Inai (Rekod Rayuan kes 12-51-95 Bahagian A muka surat 439).

Among other things it was made clear by MPPP that the premises was to be used as a hostel for students and that the use was subject to approval from the relevant Departments.

The learned Sessions Court judge had correctly found that Sri Inai had done nothing to comply with the conditions imposed by MPPP, except to take fire insurance.

In the circumstances, the question of apportionment between Sri Inai and MPPP does not arise. Sri Inai is liable, MPPP is not.

Contributory Negligence By The Students

This point was not argued in the appeal. I take it that it was abandoned. However, I wish to say that I agree with the findings and reasons given by the learned Sessions Court judge.

Quantum

The issue of quantum of damages too was not argued in the appeal. Again I take it that it has been abandoned. I confirm the awards given by the learned Sessions Court judge.

Conclusion

In the circumstances, Appeal No. 12-46-95 is dismissed with costs here and in the court below. The order of the learned Session's Court judge is varied to the extent that the appellant therein (Sri Inai) is wholly liable for the injuries suffered by the respondents and, consequently, the appellant therein (Sri Inai) is ordered to pay the whole of the damages assessed by the learned Session's Court judge. Deposit to be paid to the respondents towards taxed costs.

Appeal No. 12-51-95 is allowed with costs here and in the court below. Deposit to be refunded to the appellant (MPPP).